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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 8061

CLARK MARINE CORPORATION,

Petitioner,

versus

CARGILL, INC., CARGO CARRIERS, INC., LLOYD GRAVING AND TOM BETTS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The petitioner, Clark Marine Corporation, a corporation organized under the laws of the State of Louisiana, and at all times during the trial of this case and at the present time in bankruptcy with the Referee in Bankruptcy in the Eastern District of Louisiana, Baton Rouge Division, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered May 7, 1965, sustaining the final judgment of the United

States District Court for the Eastern District of Louisiana, Baton Rouge Division, dismissing plaintiff's action filed under the Sherman Anti-trust Act.

OPINIONS BELOW

The opinion and judgment of the District Court is cited, *Clark Marine Corporation v. Cargill*, 226 F. Supp. 103, and is set out in full in Appendix 1-A, infra. The per curiam of the Fifth Circuit Court of Appeals, which adopted the opinion of the lower court is cited in 345 Fed. (2) 103, and is set out in full in Appendix B, Page 58, infra.

JURISDICTION

This action was brought under the Sherman Anti-trust Act, 15 U.S.C.A. 1, 12 and 15, and was timely appealed from the District Court to the Fifth Circuit Court of Appeals after final judgment, the judgment of the Court of Appeals affirming the lower Court's decision and was rendered May 7, 1965.

An extension of time in which to file an application for rehearing was granted until June 28, 1965, as per order dated May 17, 1965, and an additional forty days extension was granted through August 9, 1965, by order dated June 14, 1965; and an additional extension was granted to September 1, 1965; on September 14, 1965, the Court entered an order denying the petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C.A. 1254 (1).

QUESTIONS PRESENTED

The following questions are presented by the present application:

(1) Does a bankrupt corporation have a different criteria to meet in proving a violation under the Sherman Anti-trust Act from that criteria which is applied to non-bankrupt petitioners, and in this regard clarification as to an apparent conflict should be given by this Court as between this Court's opinion in *Buckeye Powder Co. v. DuPont Powder Co.*, 233 Fed. 881 (C.C.A. 3, 1915), affirmed 248 U. S. 55 (1918), and the doctrine laid down in *United Exhibitors v. Twentieth Century Fox Distributors Corporation*, 31 Fed. Supp. 316.

(2) Did the Court of Appeals' error by improperly applying the existing principles under the law as to what constitutes a violation of the Sherman Anti-trust Act in this case, basing such an analysis on the lower court's findings of fact and stated positions on the evidence presented, specific emphasis being placed on the vertical integrated nature of the defendant companies that inherently create monopolistic opportunities.

(3) Did the Court of Appeals' error in sustaining the lower court's refusal to allow the plaintiff on rebuttal to enter into an examination of the marine operation that succeeded petitioner's bankrupt corporation in every respect, and thus rebut the contentions of the defendant that the motives of the customers to this industry in choosing their local service was governed by price, quality, service, capital structures and location but rather by hoped for reciprocity, said position of the Court of Appeals and lower court being contrary to the principle set out by this Court's recent opinion in the case of *Federal Trade Commissioner v. Consolidated Foods Corp.*, No. 422, October term, 1964, cited 85 S. Ct. 1220.

(4) Did the Court of Appeals substantially err in accept-

ing the conclusion of the lower court that Cargo Carriers, Inc., obtained a complete dominance of the fleeting and harbor towing business in the Baton Rouge Port as to grain barges because of superior service and management on the part of the said Cargo Carriers, Inc.

STATUTES INVOLVED

The statute involved in this action is the Sherman Anti-trust Act, 15 U.S.C.A. 1, et seq., the pertinent text of which is set forth in Appendix C, Page 60, infra.

STATEMENT OF THE CASE

This is an action seeking damages under the Federal Anti-trust Act, 15 U.S.C.A. 1, et seq. Complainant is Clark Marine Corporation, a Louisiana corporation presently in bankruptcy, and the defendants are Cargill, Inc., a Delaware Corporation, and Cargo Carriers, Inc., a wholly-owned subsidiary corporation of Cargill, Inc., Mr. Lloyd Graving, the Baton Rouge manager of Cargill, Inc., and Mr. Tom Betts, the Baton Rouge manager of Cargo Carriers, Inc. The complaint alleged that these four conspired to monopolize all of the docking, fleeting and switching and repair services in the Baton Rouge Port.

In order to properly understand the matters pertaining to this application, it is felt that it is absolutely necessary to review definitions with which the court might not be familiar, before reviewing the undisputed chronological history of the events leading up to and including the alleged violations of this action, with short summations of the legal positions of both sides on certain facts.

The industry that is the subject of this action is the local fleeting and harbor towing services, and related benefits, above water repairs and cleaning of barges in the Baton Rouge Port. Fleeting and harbor towing, as such, was described by the Court in its Findings of Fact (Tr. 1019, Appendix A, p. 42), as follows:

> "As these large tows (referring to river boats that are pushing a number of barges in the fashion familiar on the Mississippi River) reached the port areas (point of destination of some of the barges in the tow), it is obvious that they could not be simultaneously unloaded into the elevator. (Grain elevator.) Consequently, it was neccessary to 'park' these barges while awaiting their turn for unloading. Consequently, an area convenient to the elevator had to be provided for a sort of parking place for these barges. This area is referred to as a 'fleet,' and because of the fact that these large towboats were rather unwieldly, they were not suitable for 'switching' or moving the barges out of their tow and into the fleet. Consequently smaller harbor towboats are used to 'switch' the barges from the tow to the fleet, and later from the fleet to another town for return to its point of departure or elsewhere. Ordinarily, the owner or operator of the 'fleet' charges a certain rates per day to the owner of the barge for each day that the barge remains in the 'fleet,' and the owner of the switching boat charges either a per hour fee or a per switch fee for switching a barge in or out of the fleet. Also, it is not always practical to unload the barges in the order in which they arrive at the port because of the fact that it is necessary for the elevator to mix and blend different kinds of grain in order to fill certain orders, and consequently, they must take the grain from the barge which is carrying the particular type of grain needed for the mixing and blending then in process." (Comments in parentheses ours.)

Fleeting and switching operators also as a natural outgrowth of that service, offered repairs that could be made to barges not requiring a dry dock, as well as cleaning the barges after they had been emptied. In the case of grain barges, this meant removing the loose grain still remaining. (Tr. 131, 298)

The Court understood (Tr. 1021, Appendix A), that these auxiliary businesses were not to be considered as businesses in which the defendants intended to monopolize; that only the fleeting and switching of grain barges were at issue. Plaintiff's counsel agreed to this, but did not intend for the Court to ignore those activities which are the natural dividends of a fleeting and switching business.

History of Industry in Port: Before 1955, the Port of Baton Rouge was largely oriented to the petro-chemical industry that was generally located north of the City of Baton Rouge, along the east bank of the Mississippi River. At that time, two companies offered services to the marine industry, that is, the carriers who towed into and through the Baton Rouge Port on the Mississippi River. One was Baton Rouge Coal & Towing Company, an old company owned by members of one family, that of J. C. Werner, Jr., one of the witnesses for plaintiff during this trial. This company was primarily engaged in the general towing business on the Mississippi River (Tr. 64, 110), as well as offering the only limited general fleeting area open to the public. The other company was owned by Mr. Kenneth E. Hutton, and offered groceries and supplies to the tugboats that plied their trade through the Baton Rouge Port. Mr. Hutton also appeared as a witness for plaintiff in this action, and also has an action pending the outcome of this case under the Sherman Anti-trust Act. There

were other fleeting areas, but privately owned for the use of their own equipment, Esso Standard Oil having such an area (Tr. 94). The fleeting and harbor towing business was admittedly a very limited activity in the Baton Rouge Port at that time (Tr. 65, 66, 115, 268).

The Baton Rouge Port Commission, subsequent to the year 1955, in an effort to increase the growth of the Port, voted sufficient municipal bonds to finance the construction of a general cargo dock facility, a grain elevator and dock facility and a barge terminal. It was hoped by building these facilities to increase international trade into the Port, since the Baton Rouge Port is a so-called deep water port, available to oceangoing vessels. The barge terminal dock was located in the northern part of the harbor on what is referred to throughout the trial as the "Devil Swamp Canal," the same site of Plaintiff Clark Marine's first operation. In the center of the harbor, some five miles from the Devil Swamp Canal, was located the general cargo dock and the grain elevator, both of these docks being available for deep water, as well as barge traffic. (See defendants' Exhibits 1, 2, and 3, for a complete picture of the locations of these various dock facilities.)

The grain elevator was initially constructed to house 2.5 million bushels of grain as of the date it opened in 1955. Upon its completion, the dock and elevator were turned over to the Cargill Company on a long-term lease basis. (Court's Finding, Tr. 1020, Appendix A, p. 42).

Cargill, Inc. is a huge corporation principally engaged in the buying and selling of various types of grains and other bulk commodities and through subsidiaries, it engages in sev-

eral other businesses, usually of a related nature, such as stevedoring, towing, fuel sales, fleeting, etc. It utilized the elevator at the time it opened, as it has throughout all of the times pertinent to and considered in the trial, as a point of assembly of grains for international shipment. This grain was collected principally from its many elevators operated throughout the northern portion of the Mississippi River system, including all of the navigable connecting rivers of the Mississippi River, as well as elevators in areas not accessible by water, but by rail. After arrival in the port, the grains are blended and placed upon oceangoing vessels for international delivery, as ordered. (See Court's Findings, 1018, Appendix A, p. 42).

The elevator was and is now and has continued to be the only grain elevator in the Baton Rouge Port. (Tr. 24)

Cargill, Inc., has a wholly-owned subsidiary known as Cargo Carriers, Inc. (hereinafter referred to as "CCI"). This company is given the sole responsibility of moving the commodities owned or controlled by Cargill, Inc., on the river system (Tr. 22,585). As such, it operates barges and towboats and, in fact, operates what is believed by them to be the largest river towboat in the world (Tr. 612). This equipment is available first for the movement of Cargill commodities, but is also utilized in competing with other river transportation companies in carrying commodities for customers other than Cargill. CCI could not carry all of the commodities of Cargill and as a result a large portion (60%—see Court's findings Tr. 1018) of such business was contracted for from the other carriers on the river system, constituting Cargill as a very large shipper on the river.

It was admitted by the defendants that CCI personnel, in the furtherance of its responsibility to Cargill, also were directly and solely responsible for the placing of all such orders for Cargill commodity movements not handled in their own equipment with the identical towing companies that constituted most of the customers in the fleeting and towing business in the Baton Rouge Harbor (Tr. 22). Thus, all of the carriers of grain destined for the Cargill elevator, other than CCI, when given shipping orders were placed in the position of reciprocation by using the local harbor towing service of CCI. It was this power to place Cargill shipping orders which Plaintiff asserts gave CCI the illegal power of responsibility over these shippers forcing them to use their local fleeting and harbor services. When Cargill took possession of the grain elevator facilities in 1955, CCI likewise established offices in the Baton Rouge Port, in order to coordinate the movements of the Port, as well as directly into the elevator.

As a direct and sole result of the presence of the grain elevator in the Port, two new operations were created in 1955. Both of these companies were the outgrowth of the existing two principal operators in the Port. The first such company to be created was Louisiana Marine Repairing Service Company. This company offered fleeting and harbor towing services, and utilized boats owned by Baton Rouge Coal & Towing. Mr. Johnny Jackson was a part-owner of the new company and apparently the balance was owned by the same owners of the Baton Rouge Coal & Towing Company, the J. C. Werner family (Tr. 67, 88, 1021, Appendix A). The second new fleeting and harbor towing business began with the expansion of Mr. Kenneth Hutton's operation to include fleeting and harbor towing (Tr. 268, 269). The Court, in its Findings of

Fact, on Page 1024, Tr., Appendix A, p. 45), found that by April 1, 1959, the date CCI entered this field with its own operation besides the two companies named above engaging in the fleeting business:

> "Also a Captain Joe Hightower and a Captain Bert K. Kleinpeter each had a small boat that was suitable for switching and was available, when needed, to perform harbor work."

It is not seriously disputed that the grain business in the Baton Rouge Port was the principal commodity that governed the fate of the fleeting and harbor towing business. Finding of the Court (Tr. 1020, Appendix A, p. 41). The evidence showed that of the remaining non-grain barges, relatively few were available to fleeting operators offering a public fleeting area (Tr. 90, 115).

In 1959, the elevator's capacity was increased from 2.5 million bushels of grain to 7.7 million bushels of grain, said project again being financed by public funds in conjunction with lease agreement with Cargill, Inc. During the same time and partially because of the increase in capacity of the elevator, CCI contemplated entering into the fleeting and switching business and submitted a request for permission from Cargill to allow them to establish such an operation in the Baton Rouge Port, not only for barges that it owned or directly controlled, but likewise for any other companies, who wishes to utilize such services in the Baton Rouge Port. (Tr. 739, Exhibits P-14, P-16.)

The Court found as a matter of fact that approximately thirty-five (35%) per cent of the grain received by Cargill, Inc., to the elevator moved to the elevator by railroad car

and that the remaining sixty-five (65%) per cent of the grain received moved into the port area and into the elevator by river barge. Of the sixty-five (65%) per cent of the grain moving in barges owned and managed by CCI, approximately 30% to 40% was carried by CCI. The Court actually found 40% (Tr. 1018, Appendix A, p. 41), but defendant, Mr. Lloyd Graving, in his testimony, estimated 30% to 40% (Tr. 546).

The Court also noted that some 115 million bushels of grain were recorded as having turned over after the increase of the elevator during one year's period. These undisputed findings thus show some 42 million bushels of grain, more or less, shipped into the Cargill elevator by companies other than CCI, after the increase in capacity of the elevator. It was a portion of this business that CCI felt it could get in order to insure a profitable operation in the Baton Rouge Port. (See plaintiff's Exhibit 14, Tr. 744). It is also this business upon which this action is largely based.

Before granting permission to CCI to enter the said fleeting and towing business, Cargill required CCI to negotiate with the Baton Rouge Port Commission as to whether or not it intended to enter the fleeting and harbor towing business, basing the request solely on what they considered very poor service then being given by the existing companies (Tr. 741). The Commission indicated it had no such intention (Tr. 1023, Appendix A, p. 45). CCI, therefore, received permission from Cargill, Inc., to start its own business. Accordingly, a form letter was mailed to prospective customer towing companies under the signature of Captain Donald S. Wright, the then operations head of CCI (See Exhibit P-16), dated February 4, 1959, announcing the opening of the new fleeting service as of April 1, 1959. Other solicitations were made

by certain other employees of CCI. These solicitations were not limited to grain fleeting only. Exactly who did the soliciting is somewhat at issue.

Regardless of the question of who did solicit business, there is no dispute as to the fact that solicitation was carried out and continued to be carried out by the defendant, CCI, by personal contact and letter, and that this same company, CCI, was solely responsible for the issuance of all of the excess towing contracts to all of the customers who carried grain, of their fleeting and harbor towing business in the Baton Rouge Port.

It is reiterated that it was Clark Marine's position that it was this particular known combination of authority to give towing contracts that makes it impossible to ever directly compete in a free market with CCI for services to be rendered these same towing companies in Baton Rouge who receive these contracts, even in the absence of any threats that they will lose this business if they do not use such local service (See Reasons for Writs No. 2).

Regardless of how solicitations were carried out, it is undisputed that within a very short time, all of the grain-carrying barges in the Port were fleeted and switched by CCI, and continued to be fleeted, except for an occasional barge in the fleet of the Baton Rouge Coal & Towing until Clark Marine obtained some business in October, 1961. The actual takeover initially took from thirty to sixty days (See Tr. 71, 76, 279, 393, and Judge's Finding [Tr. 1034, Appendix A], also Exhibit P-18.) It is also undisputed that Kenneth L. Hutton, as well as Louisiana Marine filed bankruptcy proceedings after each lost his portion of the grain business

(Tr. 77, 88). Kenneth L. Hutton subsequently filed an anti-trust suit similar to the instant case against Cargill and CCI, said action still pending the outcome of this case (Tr. 315). Captain Kleinpeter and Captain Hightower likewise left the Port (Tr. 314).

The Court found nothing unusual about this remarkable success, and held that it was the result of good management and the rendering of better service (Tr. 1026, Appendix A, p. 53). Later the Court noted again that CCI (Tr. 1034, Appendix A, p. 53):

> ". . . did acquire practically all of the fleeting and switching business in the Port of Baton Rouge insofar as grain barges are concerned."

After approximately the first month's operation by CCI of its new fleet, the evidence is uncontested that the vessel used for the switching of their fleet was chartered from Baton Rouge Coal & Towing on a full found basis (Tr. 72), subject to the direct supervision of the CCI office, and using the same crews used by Louisiana Marine Repairing Service in its switching operation (Tr. 73). Thus, the sole remaining so-called competitor of CCI, until the appearance of Clark Marine's operation in the harbor, also furnished the vessel and extra vessels used to handle all of the fleeting moves in the CCI operation, solely for the CCI fleet to the obvious exclusion of Baton Rouge Coal & Towing, using the same crews and equipment supposedly previously guilty of rendering poor service (Tr. 85, et seq).

CCI established, in the use of their fleeting boat during all times pertinent to this action, a standing instruction which established a priority for use of their harbor boat. This priority

placed the grain elevator's needs first, CCI's tows second, other customer large line tows third, and so on. (See Exhibit P-12, Betts Tr. 403.) If further boats were needed, they were to be called, if one could be found, as needed, but only one full time boat was kept by CCI's operation (See Betts, Tr. 414; J. Smith, Tr. 463.)

CCI continued to operate the sole grain fleeting and switching business until the appearance of Clark Marine in January of 1961. (Defendant, Tom Betts, Tr. 393).

It is undisputed that in March, 1961, Clark Marine purchased a towboat and began offering harbor towing and switching services, as well as fleeting areas at its location, immediately adjacent to the Baton Rouge barge canal terminal in the Devil Swamp area. In conjunction with the offering of the services of fleeting and harbor towing by Clark Marine, a steam cleaning and general repair service had previously been introduced, said steam cleaning and repair business being offered on all types of barges from its opening date of January of 1961. It is during the period of time between March of 1961 and September of 1961, before Clark Marine actually moved its operation to the center of the harbor immediately across from the CCI operation that Clark Marine alleges that they were completely blocked by the defendants from receiving any harbor towing, except that which CCI itself dispatched to it, and also any fleeting of barges. During this period of time, it is undisputed that Clark Marine had no fleeting business of barges whatsoever (Tr. Clark, 157, Garner, 362), even though it was immediately adjacent to the Baton Rouge barge canal dock where some two hundred eighty-nine barges, more or less, were docked during the year 1961. (See Exhibit P-11.)

The Court adopted defendants' explanation of the lack of business and held that during this period Clark Marine, because of its location, was not in competition with CCI's operation, a conclusion vigorously disputed in this writ, especially as to towing in the harbor which, of course, is free to operate wherever the river flows. It was established by testimony and exhibits also in a fashion undisputed that Clark Marine's only harbor switching during its stay in the Devil Swamp Canal came with the direct authority of CCI's dispatching office, when extra services were needed, and that invoices for such services went to only CCI, and not to the customers for whom the work was performed. (See Defendants' Exhibits 100, 101, 102, O. V. Smith, Tr. 339, Garner, Tr. 357.) It is further shown by the superintendent of pilots for CCI, Captain John Smith's undisputed testimony, that Clark Marine was considered a competitor at all times it was in existence by him and defendant Betts. (Tr. 463, et seq.)

Clark Marine opened its operation at what is termed "Red Dog Landing" at the center of the Port, adjacent to and across from CCI, on September 7, 1961 (Court's Findings, 1030, Appendix A, p. 49). On September 15, an order was issued prohibiting the Clark Marine vessel from docking barges at the elevator. On September 16th, the order was rescinded. (See answer to plaintiff's Interrogatories, No. 24.) On September 22nd, Clark Marine called upon officers of Cargill in both Minneapolis, St. Paul, as well as in Baton Rouge, and accused them of preventing Clark Marine from receiving any business in the Baton Rouge Port, and further stating, through its representative, that some barge lines were afraid to use their services, even though they had indicated an interest to do so. (See defendant, Graving, Tr. 561, and Clark, Tr. 167.) After assurances that Cargill did not have such a policy, an

attempted meeting of the barge lines with Cargill was set up to assure the said towing companies on this point, but Cargill and one barge company refused to take part. (Defendant Graving, Tr. 566, 567). After these conferences, Mr. Heininger, very able chief counsel for Cargill in this trial, was retained to protect Cargill's position in the Port (Tr. Heininger 492). After this attempted effort, Clark Marine did begin to receive most of the harbor towing and fleeting business of American Commercial and Mississippi Valley Barge Lines and business from CCI itself. This business was not actually received until **the latter part of October, 1961. (See plaintiff's Exhibt 24**, which shows defendant's own computation of plaintiff's fleeting income; **also Garner, Tr. 359, Clark, 167.)** Clark Marine, thereafter, experienced some increase in business on all fronts, although not increasing its number of grain-carrying customers, but not enough to avoid bankruptcy in July of 1962.

Clark Marine filed a petition under Chapter X of the Bankruptcy Act in an effort to reorganize and refinance its operation on May 25, 1962, said action having the effect of actually placing the company in the hands of the district judge, G. Gordon West, who ultimately was the trial judge in this action. Judge West under authority of said reorganization actually operated the company until on his own motion he placed the company in bankruptcy on July 11, 1962. Shortly before the actual trial commenced the jury was waived by joint motion for both parties. The court then on its own motion split the issues limiting the first trial to the question of whether or not the defendants had in fact violated the Sherman Anti-trust Act, with the question of damages to be raised later if a violation was found.

It has been the contention of Clark Marine that the alleged violation of the Sherman Anti-trust Act first resulted when CCI went into the fleeting and harbor towing business and created a complete monopoly within the Port after April 1, 1959, and that this monopoly, in the form of a continuing violation, was directly felt by the said corporation during the period of time between **March of 1961 and October of 1961**, and continued thereafter even though not as abusive as prior to that date, and still continues in the Port of Baton Rouge through the date of trial.

It was defendant's principal contention that in order to prove a violation of the Anti-trust Act Clark Marine had to show it was properly capitalized, the desired business was profitable; that Clark Marine used good business judgment and that the bankruptcy resulted from the said violation; that the defendants actually made no threats of withdrawing contracts for towing, or giving contracts if their local services were not used; and finally that the success that resulted in the actual dominance of the fleeting and switching business was the natural outgrowth of good management and superior service on their part.

The Court ruled in the defendants' favor on all points.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

1. Does a bankrupt corporation have a different criteria to meet in proving a violation under the Sherman Anti-trust Act from that criteria which is applied to non-bankrupt petitioners, and in this regard clarification as to an apparent conflict of law should be given by this Court as between this

Court's opinion in *Buckeye Powder Company v. DuPont Powder Co.*, 233 Fed. 881 (C.C.A. 3, 1915), affirmed 248 U. S. 55 (1918), and the doctrine set out in *United Exhibitors v. Twentieth Century Fox Distributors Corporation*, 31 Fed. Supp. 316.

Stating the proposition another way:

Does a bankrupt plaintiff in proving a violation of the Sherman Anti-trust Act with the question of quantum removed by the Court's splitting of the issues for purposes of trial have to establish as the elements of such an action the following facts:

(1) That the business in question be considered completely separate and apart from other related businesses and in this manner make a showing of potential profit to the plaintiff had the plaintiff been successful in obtaining business in the absence of a violation of the Anti-trust Act.

(1) That the plaintiff be required to prove that it was a properly capitalized corporation at all times pertinent to the trial of the case.

(3) That a plaintiff in bankruptcy be required to prove its bankruptcy was caused principally as a result of the violation.

(4) That the management of the plaintiff's operations were prudent and wise.

This case presents an unusually clear opportunity for this court to determine one way or the other precisely how much a bankrupt plaintiff's internal problems have to do with the

proof of the violation of the Sherman Anti-trust Act by its competitors illegal activities even though such internal problems have no connection with such activities. This is made clearly possible here by the lower court's splitting the issues on its own motion just prior to the trial of this case. The Court's stated purpose in doing this was to eliminate any consideration of evidence that did not bear directly on the question of the existence of activities on the part of the defendants toward the plaintiff that would constitute a violation of the act. The question of the relative merits of the actual services rendered by the plaintiff as compared to defendants is not an issue in this regard since plaintiff obtained no business at all for a major portion of its existence, and then when it did, no question was raised as to their competency since their two customers did not leave them.

The next obvious question is whether or not such a determination is of sufficient far-reaching importance to be considered by this Court in its already overburdened workload. We take the position that it is for several reasons. (1) The authorities on this point appear to be in hopeless conflict or at least to apply separate criteria to plaintiffs that are bankrupt from those that are not. It is our position that such a position is unjustified under the Act and prejudicial to bankrupts and should not be allowed to continue; (2) if the lower court's opinion is allowed to remain unchanged and uncommented on, it would have the effect of defeating the purpose of the Act by making the successful prosecution of actions of this kind by bankrupts a virtual impossibility because of the resulting unrelated burdens of proof added and prejudicial nature of such burdens; (3) in the instant case the rights of the plaintiff have been greatly injured under the circumstances

and the actual trial and judgment and this injustice should be rectified.

Contrary to the trial court's original reason for splitting the issues it did allow the defendants full range in attempting to examine plaintiff's financial problems. A review of this record will show that a vast majority of the defendants exhibits (which exceed one hundred in number), and a great portion of the testimony presented by the defendants in defense of this action addresses itself solely to the financial condition and management decisions of the plaintiff, all of which could have no bearing on the defendant's activities. These matters all came in under objection of plaintiff as being inconsistent with the court's splitting of the issues. These objections were made in the conference which immediately preceded the trial when the defendants' proposed introduction of this evidence was made known to the judge and also during the trial (Tr. 718) when appropriate. The Court allowed all evidence presented under this heading to be introduced into the record and repeatedly stated that he would consider only that which was pertinent to the issue before the court and give no consideration to evidence on the question of quantum. See Tr. 829 as an example.

To the contrary, a review of the lower court's findings of fact and conclusions of law will show that the court discussed at length its belief that Clark Marine was badly capitalized and incredibly concluded that it would not have survived even if it got all the fleeting and harbor towing business in the port, clearly illustrating the devastating effect this evidence had on the mind of the judge. This same question had previously been submitted to the court during extensive motions for summary judgment which were denied and plaintiff at

that time and at all times thereafter relied upon the case of *United Exhibitors v. Twentieth Century Fox Film Distributing Corporation* (D.C. Pa. 31 Fed. Supp. 316; also cited in Toulmin's Anti-trust Laws, Vol. 6, page 963). In this case the Court even where no specific damage was prayed for concluded that where an established conspiracy is shown, nominal damages can be added to the injunctive relief sought. Thus, even in the absence of any evidence of actual monetary losses in the face of an established violation of the Act, this court would have no difficulty finding a basis for granting relief with damages.

Relying upon the rationale of this authority, and the court's stated purpose, when the court split the issues plaintiff dismissed witnesses that had been called to testify on the question of quantum, including some that were out of state, and otherwise stopped any efforts to prepare to meet this requirement. It was plaintiff's repeated stated position during the trial and **one which was never overruled by the trial court** that this was all that was required of it in the consideration of the issue before the Court. Why else would the Court have split issues if he did not mean to limit the evidence.

Admittedly, the question of precisely why Clark Marine went into bankruptcy has its relative importance in the ultimate determination of this action if a violation was found. But regardless of what the answer or answers to that question might be, it could in no way have had even the most remote influence on the pure issue of whether or not plaintiff was injured by the illegal actions of the defendants in the management of their business affairs. To state it another way, Clark Marine's financial structure, be it strong or weak, cer-

tainly could not have influenced the actions, one way or the other, of the defendants in its use of monopolistc powers in violation of the Sherman Anti-trust Act. The only question left by the court's splitting of the issues was whether or not defendants were singularly or jointly guilty of a violation of the Sherman Anti-trust Act and whether the plaintiff suffered as a result of such illegal actions. **How much Clark suffered is not an issue in the case, if the issues are to be truly split.** Upon splitting the issues in this fashion, the case should have automatically assumed much the same character of an action brought by the Federal Government subject only to the plaintiff showing a right of action by being a competitor in the business monopolized.

Defendants cite with some merit the case of *Buckeye Powder Company v. DuPont Powder Co.*, 223 Fed. 881 (C.C.A. 3, 1915), affirmed 248 U.S. 55 (1918). This case, although not in point of fact, did deal with the admissibility of evidence of the type considered here as being a portion of the charge to the jury and was allowed on the basis that the plaintiff's **motives** might be relevant **to the question of liability** and that the jury might consider the evidence "on the question whether the plaintiff's failure was due to the defendant's oppression or to the plaintiff's incapacity." (248 U.S. at 64). Here the plaintiff was also a bankrupt company.

Thus it would seem that on the one hand the company that is not bankrupt need not prove even one dollar's worth of loss, just a showing of injury, in some instances, in order to get not only injunctive relief but a monetary award while on the other hand the bankrupt must be ready to prove from the point of hindsight many elements that have no direct bearing whatsoever on the existence of the violation of the Anti-trust Act, even being subjected to a **motive** examination.

We take the position that this Court should clearly state that direct damage is all that need be proved in order to lay the groundwork for proving an action in violation of the Sherman Anti-trust Act. Next, we take the position that it is contrary to reason and the intent of the statute to require proof of profit, arbitrarily, since, as in the instant case, the service considered was more in the category of a reduction of an overhead rather than as a pure profitable business. The very known existence of a monopoly of the kind considered is sufficient to discourage investors from making even the usual effort for saving a company otherwise suffering from financial problems. We take the position that capitalization and business judgments have no bearing whatsoever at this point in a cause of this kind.

A bankrupt plaintiff faces monumental problems in these cases. It is practically impossible for them to retain able counsel with experience in the anti-trust field, the present case being no exception. It is likewise also almost an impossible problem to raise sufficient funds to properly investigate facts and to meet the never-ending energetic defenses that a large, wealthy corporation's many able counsel can present; again this case being no exception.

To add to these burdens, the completely extraneous requirements of explaining and defending every act on the part of a panicked management faced with probable bankruptcy is to present such a prejudicial, irrelevant and overwhelming burden as to make the Anti-trust Act meaningless to such a bankrupt.

2. Did the Court of Appeals' error by improperly applying the existing principles under the law as to what constitutes a violation of the Sherman Anti-trust Act in this case, basing such an analysis on the lower court's findings of fact and stated positions on the evidence presented, specific emphasis being placed on the vertical integrated nature of the defendant companies that inherently create monopolistic opportunities.

It is plaintiff's understanding of the law applicable to this case that in order for plaintiff to have established a violation it was required to show that a power of monopoly or unreasonable restraint of trade in vertically integrated companies did exist. After the proof of such existing power is shown, then the plaintiff would be required to show that a resulting restraint of trade or monopoly affecting the plaintiff took place. Upon completion of the proof on these points, it is plaintiff's understanding that a violation of the Sherman Anti-trust Act is then presumed to exist, regardless of the intent of the parties or the stated purpose for the combination.

It is plaintiff's contention here that the court actually made findings on basic facts which, when applied to existing law and reason, require a conclusion that these two defendants, that is, Cargill and CCI, are in fact violating the Sherman Anti-trust Act and did violate the said Act during the existence of Clark Marine Corporation to that company's detriment.

There is no dispute that Cargill and CCI are vertically integrated companies, and that CCI, in effect, had the power to threaten the loss of towing contracts over many of the

carriers if it chose to use it, arising out of the dual role exercised by it in both engaging in the local fleeting service and placing contracts with customers of that fleeting service on behalf of Cargill, Inc., for the shipment of all of Cargill commodities. As a matter of fact, the vertical nature of the companies and the dual role of CCI are admitted by defendants in the pre-trial order (Tr. 22). They simply deny ever using this position to obtain business by the use of threats that contracts would be withheld or given if the local service was or was not used, and further deny that they would have been effective if they were used.

That the contracts and solicitations by CCI for the handling of fleeting and towing operations generally were by the same personnel who were authorized to make cargo contracts with these same customers is, we submit, under the facts practically the equivalent of a legal conclusion. The Court does not deal with this point under the findings of Fact as the Court in its estimate of the legal principles governing simply disregarded the relevance of this dual role, manifestly relying upon the viewpoint as revealed by the Court's comments, that unless plaintiff's could show the intent to use or the actual use of this dual role conjointly by threats or promises or some other form of intimidation, no legal remedy was available to Plaintiff. The feeling of the Court as to the dual role itself is plainly established in its comments.

These comments were made following the testimony of Gayle H. Chapman and Captain Bogle Caplener of independent grain carrier companies dealing with CCI, and filing of affidavits of other barge line officers in which these gentlemen stated in effect that when they moved their business to CCI in 1959, they did so without giving any serious thought

to the dual capacity of "reciprocity" in the hands of CCI. (Tr. 666, 667, 846, 847).

Following the evidence, Mr. Avant, for the plaintiff, was arguing with the Court as to the admissibility of rebuttal intended to show that these men simply were not telling the truth about their company's policies in this regard. We quote a colloquy between Mr. Avant and the Court from page 875 of the transcript:

"Mr. Avant:

> "Your Honor, the purpose in calling Mr. Nelson is simply this, Mr. Caplener testified, and other representatives of barge lines have testified in this case by affidavit, in lieu of requiring them to be here, that they did not consider—Mr. Caplener said they did not even consider the business that they may do with Cargill.

"The Court:

> "Of course, in that respect, Mr. Avant, that is completely irrelevant and immaterial. I am sure they considered it. If they didn't, they were poor businessmen, but they have no obligation not to consider it. **I am only interested in knowing what Cargill and Cargo did to make them feel that they must do business with them, but I can't quite conceive of any barge line not considering the fact that Cargo is a customer as well as a competitor."** (Emphasis ours)

Again, on Page 877, the dialogue continues:

"Mr. Avant:

> "It tends to show that they do have a policy and that

> they are influenced to a large extent by the fact that they have business relations.

"The Court:

> "I am sure they do. I said they would be mighty poor businessmen if they didn't. I think it is completely irrelevant and immaterial. I am interested in whether or not there were threats by the defendants against these plaintiffs. **I don't care how much they considered it. I think it is rather ridiculous to assume that they did not consider such things."** (Emphasis ours)

These comments came at the conclusion of the trial and by this time, both sides had submitted briefs on the law and argued at length, and the Court was fully informed on the contentions of each side. Further, it should be noted that nothing in the finding of the Court rebuts these statements. (See also like comments by the Court, Tr. 502, 514, 517, 523.)

The fact the Court plainly recognized that any good businessman would take into account such integrated interests despite what the witnesses claimed to the contrary serves to emphasize the deep conflict between the plaintiff and the Court as to the legal principles governing this case. The Court simply dismissed the whole business upon the false legal premise that although there would be this conjoint interest (by its very nature economically indivisible) it would not afford any basis for legal relief unless it were connected with a threat or a promise or some other form of intimidation.

For the defendants to actually attempt to prove to the contrary is the recognition by their many able counsel that

the Court was on thin ice legally in ignoring the relevancy of this point. **It is likewise a further indication of the absolute control exercised by these huge companies over their customers, in being able to get otherwise responsible businessmen to make such comments which the Court completely rejected as "ridiculous" and which the plaintiff rebutted with such ease.** (See Prewitt Nelson's impeachment of Captain Caplener, Tr. 884, 885.)

It is plaintiff's position that the lower courts are apparently completely mistaken concerning the law on the subject and had they understood the law properly in conjunction with this clear understanding of the truth of reciprocity, they would have found a violation of the Act. Plaintiff contends that the very existence of the dual role obviates the necessity of a direct threat. **If an overt act is needed, then the act of soliciting for business in Baton Rouge, when combined with the giving of towing contracts for Cargill commodities, is act enough.**

A case that directly refutes the lower court's position in this regard is the landmark case of *U. S. v. Griffith*, 68 S. Ct. 941, 334 U.S. 100, where buying power as a monopolistic power was considered in overturning the lower court's finding for the defendant of no conspiracy and

> "no attempt to compel distributors to grant them privileges not granted their competitors, or which gave them any substantial authority over their competitors . . ." (See Page 944.)

The Supreme Court, in ruling a violation of the Act in the face of this finding of the lower court stated:

> "A man with a monopoly of theaters in any one town

commands the entrance for all films into that area. If he used that strategic position to acquire exclusive privileges in a city where he has competitors, he is employing his monopoly power as a trade weapon against his competitors. It may be a feeble, ineffective weapon where he has only one closed or monopoly town. But as those towns increase in number throughout a region, his monopoly power in them may be used with crushing effect on competitors in other places. He need not be as crass as the exhibitors in United States v. Crescent Amusement Co., supra, in order to make his monopoly power effective in his competitive situations. **Though he makes no threat to withhold the business of his closed or monopoly towns unless the distributors give him the exclusive film rights in the towns where he has competitors, the effect is likely to be the same where the two are joined. When the buying power of the entire circuit is used to negotiate films for his competitive as well as his closed towns, he is using monopoly power to expand his empire.** And even if we assume he is chargeable in legal contemplation with that purpose since the end result is the necessary and direct consequence of what he did. United States v. Pattern, supra, 226 U. S. Page 543, 33 S. Ct. Page 145, 57 L. Ed. 333, 44, L.R.S., N. S. 325." (Emphasis ours)

We consider this case governing on the instant case, and completely parallel.

Notice here no threat was actually found to have been made by defendant, yet a violation of the Act was found, which is the very opposite view of that applied by the lower court in the instant case. The effect of the combination of his buying power was felt to be present in the negotiations, even though no mention of a threat was proved. Why threaten a potential customer when it is not needed to get his business?

As to the question of whether a monopoly did result,

the Court, in the instant case, found that "practically all of the fleeting and switching business in the Port of Baton Rouge insofar as grain barges are concerned . . ." was acquired by CCI (Tr. 1034, Appendix A, p. 53). We feel justified in adding that a company with "practically all" of a certain type of business is a company that enjoys a monopoly. (See also Tr. 71, 76, 279, and 393.)

In discussing a situation not too different from the problems in the instant case, Judge August Hand in *United States v. Paramount Pictures, Inc.*, 85 Fed. Sup. 881, on Page 885, states:

> "As further reasons for directing a reconsideration of the above issues, we were asked to determine whether the vertical integration of the major defendants, which was held not to be unlawful per se, was conceived with an intent to monopolize or was of such a character as to confer a known monopoly power. **If the power be established, a specific intent to monopolize need not be shown.** As was said by Justice Douglas in United States v. Griffith, 334 U.S. 100, 105, 68. Ct. 941, 944, 92 L. Ed. 1236, and referred to in United States v. Paramount Pictures, Inc., 334 U.S. 131, 173, 68 S. Ct. 915, 92 L. Ed. 1260: 'It is, however, not always necessary to find a specific intent to restrain trade or to build a monopoly in order to find that the anti-trust laws have been violated. **It is sufficient that a restraint of trade or monopoly results as the consequence of a defendant's conduct or business arrangements.** United States v. Patten, 226 U.S. 525, 543, 33 S. Ct. 141, 145, 57 L. Ed. 333, 44 L.R.A., N.S. 325; United States v. Masonite Corp., 316 U.S. 265, 275, 62 S. Ct. 1070, 1076, 86 L. Ed. 1461. To require a greater showing would cripple the Act. As stated in United States v. Aluminum Co. of America, 2 Cir., 148 F. 2d 416, 432, 'no monopolist monopolizes unconscious of what

> he is doing.' Specific intent in the sense in which the common law used the term is necessary only where the act falls short of the results condemned by the Act.'" (Emphasis ours)

Justice Hand found defendants owned at least 70% of the first run theaters in 92 cities in the country.

> "These figures certainly indicate, when coupled with the strategic advantages of vertical integration, a power to exclude competition from these markets when desired . . . If an intent to exercise the power be thought important, it existed in this case. . . ." (At Page 894.)

Cargill had 100% dominance in the Port of Baton Rouge in the grain-storing business. CCI soon enjoyed "practically all" of the fleeting and switching of grain barges. It is submitted that the lower Court's own findings establish a pattern recognizable as being classically like these well-established landmark cases.

It is respectfully submitted that from the above authorities the lower court should have considered the inevitable and proven stifling effect the combination gave to the local industry in fleeting and harbor towing. The question that should be answered was whether or not the combination stifled and restricted competition, and the answer, using the lower court's own observations, is that insofar as the plaintiff, the four operators who were first engaged in this business and the present competitors are concerned, all uniformly are unable to match the ever-tantalizing effect of a hoped for bonus of more towing contracts as a result of using the local services of CCI. Thus, from the facts found by the lower court, a classic case of a violation of the Anti-trust Act is shown, and the decision is therefore in substantial conflict with rulings of this Court.

3. Did the Court of Appeals' error in sustaining the lower court's refusal to allow the plaintiff on rebuttal to enter into an examination of the marine operation that succeeded petitioner's bankrupt corporation in every respect, and thus rebut the contentions of the defendant that the motives of the customers to this industry in choosing their local service was governed by price, quality, service, capital structures and location but rather by hoped for reciprocity, said position of the Court of Appeals and lower court being contrary to the principle set out by this Court's recent opinion in the case of *Federal Trade Commissioner v. Consolidated Foods Corporation*, 85 S. Ct. 1220 (1965).

As shown the principal defense presented by defendants was not to deny that the power of reciprocity did exist, but simply to say that it was never used and that the customers of the fleeting and harbor towing business actually gave no real consideration to reciprocity. The defendants' contention was that this was in every sense of the word a market as free as any that had no reciprocity. In order to rebut this evidence, plaintiff attempted to open an examination of the fate of a company that in every respect succeeded the plaintiff's operation excepting only its financial problems. We refer to a company known as "228 Terminal Services, Inc." principally owned by Mr. Prewitt Nelson.

When the question of going into the operation of this successor of Clark Marine was originally raised in the pretrial order the trial court informed all parties that it con-

sidered this company after the fact and of no relevancy and would therefore not allow the evidence to be introduced by the plaintiff. The defense had prior to the beginning of the trial caused to be issued an extensive and detailed subpoena duces tecum to Mr. Nelson because of this stated purpose. When the Court stated it would not allow such evidence, the plaintiff acquiesced in this ruling and in order to accommodate Mr. Nelson lodged an objection to the subpoena at the opening of the case which was allowed by the court. The right to use Mr. Nelson on rebuttal however was reserved and he was excused from the court room.

When the defense had completed its presentation and had raised the defenses shown concerning the lack of effect of reciprocity, the plaintiff then thought it quite relevant to view just how valid these very elements had been as they applied to the succeeding company. Accordingly, Mr. Nelson was called, and on this point the court ruled that he could not testify. An offer of proof was then made into the record (trial record 888), with the court granting the usual right to submit a deposition on the subject as a substitution for the oral offering. An attempt to take this deposition was made immediately after the trial was completed but counsel for defendants requested and obtained a delay from counsel for plaintiff because of personal inconvenience. When again the deposition was attempted the record had been filed in the Court of Appeals and an objection was filed by the defense to the untimely taking of this offer of proof. An answer to this objection was made by the plaintiff showing the earlier effort to take this offer of proof and claiming a violation of confidence on the part of counsel for the defense. The Court of Appeal then ordered that the deposition be taken and accordingly and in due course it was done.

During the argument before the Court of Appeals a major portion of plaintiff's time was actually consumed in the court's considering whether or not the deposition was properly before the Court, and ultimately this was the only point given any comment in the per curiam handed down by the Court of Appeals. In this fashion the issue was clouded by this procedural matter and is discussed here only to attempt to direct this Court's attention past this to the real issue of whether or not the plaintiff had the right on rebuttal to go into Mr. Nelson's operation, a point which is validly before this court as it was before the Court of Appeals, regardless of the timeliness of the taking of the deposition by reason of the offer made in open Court.

It was and is our point that if Mr. Nelson's operation were properly financed, had a better location than defendants, better equipment, equal or better prices and the usual elements to be found in a free market consideration and still could not get one **new grain towing** customer in the Baton Rouge port from the defendants over an extended period of time, then it was felt that this was valid rebuttal to the defenses contention that reciprocity had no bearing on their phenomenal success. Even more pertinent would be the explanation given to Mr. Nelson by these customers for the refusal to even consider a change to his business.

This Court recently considered this very evidenciary question in the case of *Commissioner v. Consolidated Foods Corporation*, 85 S. Ct. 1220 (1965). In this case the court was dealing with the Clayton Act and specifically held that evidence after acquisition and, thus after the fact, was admissible in considering the existence of the continuing effect of reciprocity as an anti-trust practice. The view was that such

evidence even though being after the fact of acquisition was excellent in determining the question as to whether or not competition was stifled by reciprocity forces. This Court gave specific recognition that such a consideration is continuing in nature and therefore relevant so long as reciprocity was the element considered.

The point raised by this reason for writ is whether or not reciprocity under the Sherman Act, just as under the Clayton Act, can be validly considered on evidence that took place after the plaintiff's bankruptcy, in determining if continuing reciprocity forces are still stifling the market in which the plaintiff, though now departed, once existed. If plaintiff had successfully shown as it did in the disputed offer of proof that Mr. Nelson could do no better than the plaintiff had, even though located in the plaintiff's exact location and with considerably better financial structure, and even better equipment and that he was unable to even obtain **one** new grain towing customer during the period of time since he had entered the business up to the date of trial, a period of over a year, we feel that such a consideration under such circumstances falls within the meaning, the reasoning and the rule set out in the *Commissioner v. Consolidated Corporation* case as being a valid and highly effective way of refuting the claim of a free market made by the defense.

4. Did the Court of Appeals substantially err in accepting the conclusion of the lower court that Cargo Carriers, Inc., obtained a complete dominance of the fleeting and harbor towing business in the Baton Rouge Port as to grain barges because of superior service and management on the part of the said Cargo Carriers, Inc.

It is our position that where a company such as the defendant CCI enters an otherwise highly competitive field and immediately obtains control of all of the business from customers who are actually their competitors in the towing business, then such a success cannot be viewed as anything but unnatural. When it is further seen that these competitors are subjected to a priority system of service which of necessity favors CCI and Cargill over their own equipment and at prices considerably greater than previously charged then no amount of explanation can be given which could cover a clear violation of the Sherman Act where the power of reciprocity over these same customers is admittedly present.

It is our understanding that this court is loath to grant writs on questions that are not of general concern. This particular reason for writ is therefore added without extensive explanation in order to assure its consideration if a writ if granted for the reasons otherwise shown that do have general and universal importance.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Dated at Baton Rouge, Louisiana, December 3, 1965.

Respectfully submitted,

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